

OpJAGAF 2018-41, 14 September 2018, FOIA - First Party Release of Information to Third Party

TOPIC

Releasing a first party individual's personal information to a third party Freedom of Information Act (FOIA) requester when it is determined the first party has a privacy interest that is not outweighed by the general public's interest in the requested information.

TEXT OF THE DECISION

This opinion is in response to a request for a review of the proposed release of a commander directed investigation (CDI) to a media FOIA requester (or any other third party requester), when it is determined the subject of the CDI has an overriding personal privacy interest in keeping from release under the FOIA the CDI that was conducted against him.

BACKGROUND

A news media entity made a FOIA request for a copy of a CDI conducted against a particular named subject. The allegations made against the subject were not substantiated, and public interest in the particular investigation (other than from the requester) was non-existent.

It was proposed the CDI be released, with all personal identifiable information of the subject (name, rank, duty title, etc) redacted in order to protect his privacy.

GUIDANCE

Privacy Act of 1974, 5 U.S.C. § 552a (b)(2)

Freedom of Information Act, 5 U.S.C. § 552 (b)(6); (b)(7)(C)

DoD 5400.11-R, *DoD Privacy Program*

AFMAN 33-302, *Freedom of Information Act*

DISCUSSION

In this case, the CDI is considered the Privacy Act record of the subject investigated, as the ROI is a record retrieved/managed/kept by the Air Force under the subject's name or other personal identifier of the subject. The Privacy Act of 1974, 5 U.S.C. § 552a (b)(2), permits a federal agency to provide part or all of a Privacy Act record to a FOIA requester if release of the information is required under the FOIA. DoD privacy policy follows the same rules for personal information of individuals contained in non-Privacy Act records. *See* DoD 5400.11-R.

The CDI is about alleged misconduct of the subject of the investigation. The allegations investigated in the CDI against the subject were not substantiated. Under FOIA exemptions (b)(6)

and (b)(7)(C), personal information about a person contained in an Air Force record is not releasable under the FOIA unless the general public interest in the information concerning how the Air Force conducts its various statutory and regulatory duties missions outweighs any personal privacy interest of information about an individual contained in the record.

The proposal to significantly redact the ROI to withhold/mask the name of the subject and his identify as mentioned in the CDI in order to protect his privacy/identity, but otherwise release the report, is insufficient in this case to properly protect the paramount privacy interest the subject has in not releasing to the public the fact he was investigated for alleged misconduct that was not substantiated. In this case, the FOIA requester asked for the record using the subject's name or otherwise knows the record he is requesting is about the particular named subject. Accordingly, releasing any part of the CDI to the FOIA requester would serve as the Air Force's confirmation that the subject was investigated by the Air Force for alleged misconduct/improprieties that was not substantiated— one of the very privacy interests of the subject the FOIA otherwise would not allow to be acknowledged without a sufficient public interest in the particular information requested.

There may be situations in which a third party FOIA requester is able to receive a redacted record under the above circumstances, such as a reprisal complainant under the provisions of 10 U.S.C. § 1034, or to a complainant if a Privacy Act System of Record's "routine use" use provision permits limited release of such information to complainants in certain cases. However, those are rarer cases and do not apply when a "run of the mill" third party FOIA requester, such as the media, a witness, or another member of the public, requests such records under the FOIA.

CONCLUSION

Based on the foregoing, it is our conclusion that the CDI is properly withheld in its entirety from the media FOIA requester, as the personal privacy interest of the subject of the investigation is not outweighed by the appropriate public interest. Because the request was made using the name of the subject, or it is otherwise reasonably known that the FOIA requester knows to whom the report he is requesting pertains to, no amount of PII redaction of the subject's identity will serve to appropriately protect the overriding privacy interest of the subject in keeping from public release under the FOIA an investigation of allegations made against him that were not substantiated.

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